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Sky Canyon Properties, LLC v. Golf Club at Black Rock, LLC Respondent's Brief Dckt. 42216

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IN THE SUPREME COURT OF THE STATE OF IDAHO

SKY CANYON PROPERTIES, LLC, an Idaho limited liability company; ROBERT C. SAMUEL; a married man; JOE K. DONALD AND LISBETH LILLEMORE DONALD, husband and wife; WAYNE A. GIANOTTI AND CAROLYN M. GIANOTTI, Trustees of the Gianotti Revocable Trust U-A dated January 29, 1991; RUSSELL M. WICKS AND EVELYN L. WICKS, husband and wife; BUDDY C. STANLEY AND JUDITH L. STANLEY, Trustees of the Stanley Family Trust dated February 26, 2004; CRAIG R. FALLON AND M. ELLEN FALLON, husband and wife,

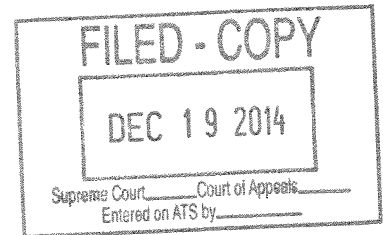
Plaintiffs/Counter-Defendants/Appellants,

vs.

THE GOLF CLUB AT BLACK ROCK, LLC, an Idaho limited liability company,

Defendant/Counterclaimant/
Respondent.

Supreme Court
Docket No. 42216



RESPONDENT'S BRIEF

Honorable John T. Mitchell, District Court Judge, Presiding

Appeal from the District Court of the First
Judicial District For Kootenai County

JOHN F. MAGNUSON
Attorney at Law
P.O. Box 2350
1250 Northwood Center Crt., Ste. A
Coeur d'Alene, ID 83816
Attorney for Respondent

MISCHELLE R. FULGHAM
LINDSEY R. SIMON
Lukins & Annis, P.S.
601 E. Front Ave., Ste. 502
Coeur d'Alene, ID 83814
Attorneys for Appellants

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I. STATEMENT OF THE CASE.

A. Nature of the Case.

Sky Canyon Properties, LLC and the other identified Appellants (collectively referred to herein as “Sky Canyon”) are all owners of residential lots in the Black Rock development in Kootenai County. The Appellants’ lots are subject to the terms of a certain set of Covenants, Conditions, and Restrictions of Black Rock (the “Declaration”). The Golf Club at Black Rock (“The Golf Club”) claimed status as a “Declarant” under the Declaration, together with all rights arising therefrom.

Sky Canyon filed suit for declaratory relief against the Golf Club, seeking two forms of relief: (1) That the Golf Club did not qualify as a “Declarant” under the Declaration; and (2) That the “Period of Declarant Control” under the Declaration had expired. The District Court granted summary judgment in favor of the Golf Club on both claims. Sky Canyon only appealed from the District Court’s determination that the Gold Club qualified as a “Declarant” under the Declaration. This Court reversed the District Court’s determination that the Golf Club qualified as a “Declarant” under the Declaration. Sky Canyon Properties, LLC v. Golf Club at Black Rock, LLC, 155 Idaho 604, 315 P.3d 792 (2013). This Court awarded Sky Canyon its attorney fees and costs on appeal. Those sums have been paid and are not at issue in this proceeding.

On remand, Sky Canyon requested an award of its pre-appeal attorney fees and costs. The Golf Club objected, claiming that such an award was beyond the scope of this Court’s remand, that there was no overall “prevailing party,” and that Sky Canyon had waived any claim to fees under Section 24.8 of the Declaration by failing to plead entitlement to the same. The District Court denied Sky Canyon’s fee request and this appeal followed.

B. Course of Proceedings.

On April 1, 2011, Sky Canyon filed suit against The Golf Club. R(1), Vol. 1, pp. 1-6.¹ Sky Canyon asserted claims for declaratory relief pursuant to I.C. §10-1201, et. seq. Id. at p. 6. Id. Sky Canyon's claims for declaratory relief arose out of a set of Covenants, Conditions, and Restrictions of Black Rock (recorded as Kootenai County Instrument No. 1689309) (hereafter "the Declaration"). Specifically, Sky Canyon sought two (2) forms of declaratory relief:

- (1) That the Golf Club did not qualify as a "Declarant" under Section 27.7 of the Declaration; and
- (2) That the "Period of Declarant Control," as defined in Section 2.43 of the Declaration, had expired.

Id. at p. 5 (¶31); p. 6 (¶40). Sky Canyon's complaint also included the following request for attorney fees:

2. Attorney fees and costs of \$5,000 if this matter shall go by default or pursuant to Idaho Code §12-121 if it is contested....

Id. at p. 6. Sky Canyon's complaint did not assert a claim for attorney fees under the Declaration.²

Sky Canyon and the Golf Club thereafter filed cross-motions for summary judgment. The Golf Club claimed that the "Period of Declarant Control," as defined in Section 2.43 of the Declaration, remained in effect. R(1), Vol. II, pp. 458-59. Specifically, the Golf Club argued as

¹On August 5, 2014, this Court entered its "Order Augmenting Appeal." The Court's Order augmented the record in this case with the Court File, Reporter's Transcript, and Clerk's Record filed in prior Appeal No. 39831 (Sky Canyon Properties, LLC v. The Golf Club at Black Rock, LLC, 155 Idaho 604, 315 P.3d 792 (2013)). The Clerk's Record in Appeal No. 39381 is referred to herein by the acronym "R(1)," with citation to the applicable volume. For example, Volume 1 of the Clerk's Record from Appeal No. 39831 is referred to herein as "R(1), Vol. 1." The Clerk's Record prepared as part of this appeal (Docket No. 42216) is referred to herein by the acronym "R(2)."

²Section 24.8 of the Declaration authorizes an award of reasonable attorney fees and costs incurred in an action to enforce the provisions of the Declaration. R(1), Vol. 1, p. 435.

follows:

- (1) The Declaration defines the “Period of Declarant Control” as extending twenty (20) years after the recordation date of the Declaration (July 31, 2001) or until the date upon which the Declarant has recorded the plats of all “Expansion Property” and sold ninety percent (90%) of the Lots to Owners other than Declarant or Builders in each of the Plats, whichever occurs later. R(1), p. 366, §2.43.
- (2) If the Declarant determines that no additional property shall be added to the project by way of “Expansion Property,” then the Declarant must provide written notice of the same to the Black Rock Homeowners Association. Id.
- (3) The Declaration defines “Expansion Property” as “such additional real property now owned or in the future acquired by Declarant (including any successor Declarant) as Declarant may make subject to the provisions of this Declaration, by duly recorded Declaration of Annexation.” R(2), Vol. 1, p. 365 (§2.31).
- (4) Section 22 of the Declaration provides the Declarant with the exclusive right to expand the effect of the Declaration to include all or part of the “Expansion Property,” whether now or in the future acquired by the Declarant or any Successor Declarant. R(1), Vol. 1, p. 433 (§22.1).
- (5) When the Declarant “has determined that no further property shall be added to the project, [the] Declarant shall notify the Association in writing. Until such notice is given, Declarant retains the right to designate additional property as “Expansion Property.” R(1), Vol. 1, p. 366 (§2.43).

R(1), Vol. 2, pp. 458-59.

In response to the Golf Club’s argument that the “Period of Declarant Control” remained in effect, Sky Canyon conceded: “There is no disputed issue of fact that the Period of Declarant Control remains in effect.” R(1), Vol. 2, p. 706. Sky Canyon further conceded on summary judgment that it did not raise any issue with the argument made by the Golf Club that the “Period of Declarant Control” remained in effect. R(1), Vol. 2, pp. 458-59; 706.

With respect to the second part of its claim for declaratory relief, Sky Canyon argued that the

Golf Club was not qualified as a “Successor Declarant” pursuant to the language of Section 27.7 of the Declaration. In summary, Sky Canyon argued that the Golf Club did not qualify as a “Successor Declarant” because it did not acquire “all or part of the Property in a bulk purchase for the purpose of development and sale. R(1), p. 439 (§27.7).

On December 13, 2011, the District Court entered its “Memorandum Decision and Order” on the parties’ cross-motions for summary judgment. R(1), Vol. 3, pp. 752-69. As to Sky Canyon’s claim that “the Period of Declarant Control ha[d] expired,” the District Court held: “There is no dispute that the parties are still in the ‘Period of Declarant Control.’” R(1), Vol. 3, p. 753.

The District Court also rejected Sky Canyon’s second claim for declaratory relief, finding that the Golf Club qualified as a “Successor Declarant” under §27.7 of the Declaration. *Id.* at p. 768.

Sky Canyon unsuccessfully moved for reconsideration. R(1 - Augmented), pp. 59-77. The Court also entered a Judgment and a Supplemental Judgment, awarding the Golf Club attorney fees under §24.8 of the Declaration in the total amount of \$27,292.85. R(1), Vol. 3, pp. 787-91; R(1 - augmented), pp. 100-01. Sky Canyon timely appealed the District Court’s judgments to this Court.

In its first appeal, Sky Canyon asked that this Court: (1) reverse the District Court’s grant of summary judgment to the Golf Club; (2) reverse the District Court’s denial of Sky Canyon’s motion for summary judgment; and (3) award Sky Canyon attorney fees on appeal. *See* “Appellants’ Opening Brief” in Supreme Court Docket No. 39831 at pp. 26-27. Sky Canyon’s request for an award of attorney fees on appeal was made pursuant to §24.8 of the Declaration. Similarly, in Sky Canyon’s Reply Brief, it only requested an award of attorney fees “on appeal.” *See* Sky Canyon’s Reply Brief in Supreme Court Docket No. 39831 at pp. 17-18. Sky Canyon did not request that this Court order an award of attorney fees incurred by Sky Canyon in proceedings before the District

Court.

This Court subsequently entered its opinion in Sky Canyon Properties, LLC v. The Golf Club at Black Rock, LLC, 155 Idaho 604, 315 P.3d 792 (2013). The Court held that the Golf Club did not qualify as a “Successor Declarant” under §27.7 of the Declaration. 155 Idaho at 609. The Court “remand[ed] this case with directions to enter a judgment consistent with the opinion. We award costs and attorney fees on appeal to the Appellants [Sky Canyon].” 155 Idaho at 610.³

On January 10, 2014, the District Court entered Judgment on Remand. R(2), pp. 31-34. The District Court’s judgment granted Sky Canyon declaratory relief that established that the Golf Club did not qualify as the Successor Declarant under §27.7 of the Declaration. Id. Sky Canyon then filed a “Memorandum of Attorney’s Fees and Costs,” seeking an additional award of \$45,546.50 in fees and \$802.15 in costs incurred in proceedings before the District Court. Id. at pp. 60-64. The Golf Club timely objected to Sky Canyon’s “Memorandum of Attorney’s Fees and Costs.” Id. at pp. 81-90.

In support of its objection, the Golf Club argued as follows:

- (1) Sky Canyon did not preserve a claim to pre-appeal attorney fees under §27.7 of the Declaration.
- (2) Sky Canyon did not preserve the issue of attorney fees at trial due to its failure to identify the same as an issue for which relief was sought in the first appeal.
- (3) This Court did not remand the case for the specific purpose of awarding Sky Canyon any attorney fees it had incurred at the District Court level.
- (4) Given that the Golf Club had prevailed on one of the two claims Sky Canyon

³On January 21, 2014, this Court awarded Sky Canyon \$31,615 in attorney fees incurred on appeal (together with an additional award of \$2,040.32 in costs). That fee award was satisfied and is not at issue in this proceeding.

had made for declaratory relief, the concept of an overall “prevailing party” was mixed.

- (5) To the extent that Sky Canyon was authorized to recover attorney fees and costs incurred prior to the first appeal, then the sums requested by Sky Canyon were not “reasonable.”

R(2), pp. 85-88.

Following briefing and argument, the District Court entered its May 1, 2014 “Memorandum Decision and Order.” R(2), pp. 102-17. The District Court denied Sky Canyon’s request for an award of pre-appeal attorney fees and costs. The District Court held:

This Court finds the Idaho Supreme Court in the instant case was silent as to the issue of Sky Canyon’s attorney fees before the District Court incurred prior to Sky Canyon’s appeal. The Idaho Supreme Court specifically reversed this Court’s award of costs and attorney fees to Golf Club: Therefore, we reverse the judgment of the District Court, including its award of costs and attorney fees to the Golf Club.” 2013 Opinion no. 114, p. 9, Sky Canyon Properties, LLC v. Golf Club at Black Rock, LLC, 155 Idaho 604, 610, 315 P.3d 792, 798. Yet, in doing so, the Idaho Supreme Court was silent on the issue of whether Sky Canyon is now entitled to its fees at the District Court level. The Court also finds the Idaho Supreme Court in Star Phoenix v. Hecla, 130 Idaho 223, 939 P.2d 542 (1997) was not silent as to that issue. In the present case, the Idaho Supreme Court specifically found that Sky Canyon was entitled to attorney fees and costs on appeal, and apparently has in fact awarded those fees and costs in favor of Sky Canyon and against Golf Club. Yet, in doing so, the Idaho Supreme Court was silent on the issue of whether Sky Canyon is entitled to its fees at the District Court level.

The Court finds this silence by the Idaho Supreme Court was intentional and has significance when compared with a specific directive by the Idaho Supreme Court in Star Phoenix. In light of that silence and in light of the Idaho Supreme Court’s decision in Star Phoenix, this Court finds it would be error to award costs and attorney fees to Sky Canyon for work before the District Court. R(2), pp. 110-11.⁴ Sky Canyon timely appealed the District Court’s “Order Denying Plaintiff’s Attorney Fees and Costs.”

⁴Given its reasoning, the District Court did not address the Golf Club’s arguments related to “prevailing party” or “reasonableness” issues. R(2), p. 113.

II. ISSUES PRESENTED ON APPEAL.

1. Whether the District Court erred in denying Sky Canyon's request for an award of attorney fees and costs incurred in proceedings prior to its first appeal?
2. Whether the District Court's denial of Sky Canyon's request for an award of attorney fees and costs at the trial court level was proper based upon the alternative grounds urged by the Golf Club?
3. Whether the Golf Club is entitled to an award of attorney fees incurred in this appeal pursuant to §24.8 of the Declaration?

III. STANDARD OF REVIEW.

Attorney fees cannot be recovered unless they are authorized by statute or by an express agreement between the parties. Kidwell and Heiser v. Finley, 96 Idaho 534, 531 P.2d 1179 (1975). Whether there is such a statute or express agreement is a question of law over which this Court exercises free review. American West Enterprises, Inc. v. CNH, LLC, 155 Idaho 746, 755, 316 P.3d 662 (2013).

The trial court is to determine, in an exercise of its discretion, whether or not there is a prevailing party. See, e.g., Chadderdon v. King, 104 Idaho 406, 659 P.2d 160 (Ct. App. 1983). In determining whether or not there is a "prevailing party," the trial court is to consider both the presence and absence of awards of affirmative relief, and whether either party prevailed in whole or in part. Id. A district court's determination as to a "prevailing party" is reviewed for an abuse of discretion. Chadderdon v. King, supra. See also, Jones v. Whitely, 112 Idaho 886, 736 P.2d 1340 (Ct. App. 1987).

A determination of the amount of fees to be awarded, i.e., “the reasonableness” of the same, is a matter of discretion. Spidell v. Jenkins, 111 Idaho 857, 727 P.2d 1285 (Ct. App. 1986). As such, a determination of “reasonableness” by a trial court is reviewable under an abuse of discretion standard.

IV. ARGUMENT.

A. The District Court Properly Determined that Sky Canyon Had Failed to Preserve the Issue of Pre-Appeal Attorney Fees and, as a Result, That This Court Had Granted No Relief in That Regard.

1. Sky Canyon Failed to Preserve Any Claim to Pre-Appeal Attorney Fees.

Sky Canyon’s first appeal was from the District Court’s Order granting the Golf Club’s motion for summary judgment. R(1), pp. 974-80. Sky Canyon requested that this Court reverse the District Court’s summary judgment, direct entry of summary judgment in favor of Sky Canyon on remand, and award Sky Canyon its attorney fees on appeal. R(2), pp. 68-80. This Court ultimately reversed the District Court’s Order granting summary judgment to the Golf Club, remanded the matter for entry of summary judgment on the issue of the Golf Club’s disqualification as a “Successor Declarant” under Section 27.7 of the Declaration, and awarded “costs and attorney fees on appeal” to Sky Canyon. Sky Canyon Properties, LLC v. The Golf Club at Black Rock, LLC, 604 Idaho at 610. In proceedings on remand, the District Court was made aware that Sky Canyon had not requested a remand from this Court for purposes of entry of an award of pre-appeal attorney fees or costs. R(2), pp. 68-80.

In Star Phoenix v. Hecla, 130 Idaho 223, 939 P.2d 542 (1997), Star Phoenix brought a claim for declaratory relief against Hecla Mining Company (Hecla). Hecla, in turn, counterclaimed for

declaratory relief. The District Court granted summary judgment in favor of Star Phoenix on its declaratory judgment claim. 130 Idaho at 229. The District Court also awarded fees to Star Phoenix under I.C. §12-120(3). 130 Idaho at 233.

On appeal, this Court reversed the District Court's Order on summary judgment, and remanded the matter for entry of summary judgment in favor of Hecla. Id. In contrast to its ruling on Sky Canyon's first appeal, the Court in Star Phoenix v. Hecla remanded the matter with the direction that "the trial court ... award attorney fees, including those on appeal, to Hecla pursuant to I.C. §12-120(3)." Id.

In opposition to Sky Canyon's request for an award of pre-appeal attorney fees on remand, the Golf Club cited the case of Star Phoenix v. Hecla. The Golf Club argued that if Sky Canyon had preserved a claim to pre-appeal attorney fees, and if Sky Canyon had advanced the claim before this Court, that this Court would have specifically remanded the matter (as it did in Star Phoenix v. Hecla) for an award of attorney fees incurred both on appeal and pre-appeal. The District Court found that the distinction between this Court's remand in Star Phoenix v. Hecla (directing an award of attorney fees on appeal and attorney fees incurred pre-appeal) and this Court's remand in Sky Canyon v. The Golf Club at Black Rock (directing an award of attorney fees on appeal only) was persuasive:

The Court finds this silence by the Idaho Supreme Court was intentional and has significance when compared with the specific directive by the Idaho Supreme Court in Star Phoenix. In light of that silence and in light of the Idaho Supreme Court's decision in Star Phoenix, this Court finds it would be error to award costs and attorney fees to Sky Canyon for work before the District Court.

...

There are some similarities between Star Phoenix and the present case. Star

Phoenix filed a declaratory judgment against Hecla on the issue of default on a lease.... On summary judgment, the District Court granted partial summary judgment for Star Phoenix, found the lease was unambiguous, and later instructed the jury that Hecla was in breach of the lease by giving the termination notice and by refusing to rescind the termination notice.... The Idaho Supreme Court reversed the District Court's finding that Hecla breached the lease, specifically finding that Hecla did not breach the lease.... The Idaho Supreme Court reversed the judgment against Hecla and remanded the case to the trial court for entry of judgment in favor of Hecla and concluded:

We award Hecla costs on appeal. On remand, we direct the trial court to award attorney fees, including those on appeal, to Hecla pursuant to I.C. §12-120(3).

130 Idaho 223, 233, 939 P.2d 542, 552. In the present case, the Idaho Supreme Court was silent on the issue of attorney fees before the District Court. The Idaho Supreme Court awarded costs and fees on appeal to Sky Canyon, but rather having the District Court decide the amount of costs and fees on appeal ..., the Idaho Supreme Court has already taken up that issue and awarded Sky Canyon its attorney fees of \$31,615 and costs of \$2,040.32 on appeal....

R(2), pp. 111-12. Given the indistinguishable nature of the procedural context in Star Phoenix v. Hecla, and given that Sky Canyon never raised the issue of a claim to pre-appeal attorney fees in its Notice of Appeal or its briefing to this Court, the District Court's decision was proper and should be affirmed.

2. Sky Canyon Has Failed to Establish Error on the Part of the District Court.

Sky Canyon argues that the District Court's failure to award Sky Canyon its pre-appeal attorney fees was error based upon this Court's decisions in Great Plains Equipment, Inc. v. Northwest Pipeline Corporation, 130 Idaho 754, 979 P.2d 627 (1999) ("Great Plains I") and Great Plains Equipment, Inc. v. Northwest Pipeline Corporation, 136 Idaho 466, 36 P.3d 218 (2001) ("Great Plains II"). In the context of the two Great Plains cases, Northwest Pipeline Corporation entered into a contract with Great Plains for the construction of various pipeline and related facilities.

Great Plains later quit the job and was forced into an involuntary bankruptcy. Numerous subcontractors filed liens against NWP for unpaid amounts. Judgment was entered in favor of the subcontractors on various legal theories. The trial court awarded attorney fees to the prevailing lien claimants. NWP then appealed.

In Great Plains I, this Court reversed the District Court's Judgment awarding recovery to various subcontractors on their lien claims. 132 Idaho at 771. Since attorney fees had been awarded to the subcontractors pursuant to I.C. §45-513 (which authorizes an award of attorney fees to the prevailing party on a lien claim), this Court vacated the District Court's award of attorney fees to the various subcontractors. Given the mixed results on appeal, no attorney fees were awarded on appeal to either party.

On remand, NWP filed a request for an award of its pre-appeal attorney fees and costs. Several of the subcontractors objected. The District Court awarded attorney fees and costs to NWP, and the affected subcontractors appealed.

On appeal, the subcontractors argued that this Court's decision in Great Plains I (declining to award attorney fees on appeal) precluded any subsequent claim on the part of NWP to pre-appeal fees. This Court disagreed, holding:

The remittitur must remain consistent with the opinion and cannot go beyond the scope of the opinion. The opinion of Great Plains I established that the awards of costs and fees to the certain Plaintiffs were to be vacated and that no attorney fees or costs were to be awarded on appeal. The remittitur did not preclude the District Court from making an award of costs and attorney fees.

Great Plains v. Northwest Pipeline, 136 Idaho at 474. The Court's holding in Great Plains II is distinguishable.

First, in Great Plains I, NWP had made a request to both the District Court and this Court for

an award of attorney fees under I.C. §12-120(3). In contrast, in this case, the basis set forth in Sky Canyon's Complaint for an award of attorney fees at the District Court level was I.C. §12-121. R(1), p. 6. On appeal, Sky Canyon asked this Court to award fees on appeal pursuant to Section 24.8 of the Declaration. Second, Sky Canyon never made a claim for pre-appeal attorney fees in the first appeal, whether as an issue identified in its Notice of Appeal or its briefing. Third, because of the different language employed by this Court in its remittiturs in Star Phoenix v. Hecla and Great Plains I, one must by necessity conclude that both Hecla and NWP identified their claim of entitlement to pre-appeal attorney fees as an issue on appeal and set forth a properly plead claim to the same in their respective complaints. Such is not the case at bar.

Moreover, the remaining bases for Sky Canyon's reliance upon this Court's holdings in Great Plains I and Great Plains II are not persuasive. Even if Sky Canyon did not waive its claim to pre-appeal attorney fees, and even if the District Court was vested with jurisdiction on remand to make such an award, there has been no showing that Sky Canyon was the overall prevailing party at trial. For reasons set forth in Section IV.C, infra, Sky Canyon prevailed on one of its two claims for declaratory relief and the Golf Club prevailed on the other. Based upon its rationale, the District Court did not reach the issue of "prevailing party." R(2), p. 113. In the event Sky Canyon preserved its claim to pre-appeal attorney fees, and in the event the District Court had jurisdiction to make such an award, then the matter should be remanded to the District Court for an analysis and determination of the "prevailing party" issue.

Sky Canyon also claims that it could not have made a request for fees and costs under IRCP 54 until it had been determined to be the prevailing party on remand. Sky Canyon's argument misses the point. While it is true that Sky Canyon could not file a memorandum of fees and costs for an

award of attorney fees at the trial court level until after entry of a judgment on remand, Sky Canyon did not preserve any right to do so. Sky Canyon sought an award of attorney fees through its complaint pursuant to I.C. §12-121. On remand, Sky Canyon sought an award of attorney fees under Section 24.8 of the Declaration. R(2), p. 61. Even if Sky Canyon preserved a claim to pre-appeal attorney fees, it first needed to establish that it was the overall “prevailing party,” and then it had to establish a basis for an award of attorney fees under §12-121. It failed in both respects.

Finally, Sky Canyon makes various references in its brief to a claim of entitlement for fees under I.C. §12-120(3). For example, Sky Canyon argues that, “The District Court properly exercised its discretion to determine that Sky Canyon was the prevailing party for an award of attorney’s fees pursuant to Idaho Code §12-120(3)....” See Appellant’s Brief at p. 6. However, the District Court never made such a determination. Moreover, Sky Canyon never asserted any claim to fees under I.C. §12-120(3). Finally, because there was no “commercial transaction” between Sky Canyon and the Golf Club, §12-120(3) is wholly inapplicable.

In Great Plains II, this Court held, “There must be a commercial transaction between the parties for attorney fees to be awarded.” 136 Idaho at 471. See also Jacklin Land Company v. Blue Dog RV, Inc., 151 Idaho 242, 254 P.3d 1238 (2011). As was the case in Jacklin Land Company v. Blue Dog RV, Inc., the party requesting fees (Sky Canyon) has failed to establish that it entered into a commercial transaction with the Golf Club. Both parties simply claimed rights under recorded covenants affecting real property that were not part of any direct contractual relationship or agreement between them.

B. The District Court's Determination is Affirmable on the Basis that Sky Canyon's Complaint Did Not Seek an Award of Attorney Fees Under Section 24.8 of the Declaration.

As noted, the only basis for an award of attorney fees set forth in Sky Canyon's complaint was I.C. §12-121. R(1), p. 6. On remand, Sky Canyon requested fees under Section 24.8 of the Declaration, although no such claim was articulated in its complaint. Sky Canyon's failure to identify Section 24.8 as the basis for its fee claim in its complaint should bar Sky Canyon from any recovery of pre-appeal attorney fees under said authority.

In DAR, Inc. v. Sheffer, 134 Idaho 141, 997 P.2d 602 (2000), this Court vacated an award of attorney fees at the District Court level because the complaint did "not recite any authority, either statute or rule, which would entitle the Plaintiff to an award of fees." 134 Idaho at 147. Clearly, I.C. §12-121 does not apply nor does Sky Canyon make any argument to that effect. As such, Sky Canyon's Complaint included no citation of authority for prayer for relief that would otherwise entitle Sky Canyon to an award of pre-appeal attorney fees assuming that the issue was properly preserved.

C. The District Court's Decision is Affirmable on the Basis that Sky Canyon Was Not the "Prevailing Party" with Respect to the Entirety of the Issues Before the District Court.

Sky Canyon sought two forms of declaratory relief. First, Sky Canyon sought a declaration that the "Period of Declarant Control" had expired. Second, Sky Canyon sought a declaration that the Golf Club was not qualified as a "Successor Declarant" under Section 27.7 of the Declaration.

With respect to its claim regarding the "Period of Declarant Control" issue, Sky Canyon ultimately abandoned the same. R(1), Vol. 2, pp. 458-59; 706. Based on this concession, the District Court held: "There is no dispute that the parties are still in the 'Period of Declarant

Control.” R(1), Vol. 3, p. 753.

Sky Canyon did prevail, following appeal to this Court, on its claim for declaratory relief that the Golf Club was not qualified as a “Successor Declarant” under Section 27.7 of the Declaration. However, when viewed in the context of the total relief sought against the total relief granted, Sky Canyon only obtained one-half of what it sought. Similarly, the Golf Club only got half of what it wanted. For purposes of awarding fees incurred pre-appeal, there were no prevailing party.

In fact, in light of Sky Canyon’s abandonment of the “Period of Declarant Control” claim, and in light of this Court’s ruling, Sky Canyon succeeded in establishing (1) that there was still a Declarant and (2) that the Declarant was not the Golf Club. By necessity, that meant that somebody was still the Declarant. Since the Golf Club claimed to have succeeded to whatever rights were held by the original Declarant (Black Rock Development, Inc.), and since the Golf Club was not qualified as a “Successor Declarant,” that meant that, by necessity, that Black Rock Development still qualified as “Declarant” under the Declaration.

Based upon the foregoing, should this Court find that Sky Canyon properly preserved its claim to pre-appeal attorney fees, then the matter should be remanded to the District Court for a determination as to the issue of the prevailing party. This Court has previously held that the determination of “a prevailing party” in proceedings before the District Court was an issue that should be determined, in the first instance, by the District Court itself. See, e.g., Jacklin Land Company v. Blue Dog RV, Inc., 151 Idaho 242, 254 P.3d 1238 (2011). In Jacklin Land Company v. Blue Dog RV, this Court, in reversing a grant of summary judgment, remanded the case to the District Court “to redetermine the issue of a prevailing party, if any.” 151 Idaho at 250.

D. In the Event This Court Reverses the District Court, Sky Canyon has Failed to Demonstrate the “Reasonableness” of the Fees Requested and the Matter Should be Remanded for a Resolution of that Issue.

On remand, Sky Canyon sought an award of attorney fees under Section 24.8 of the Declaration.⁵ Section 24.8 only authorizes the recovery of “reasonable” attorney’s fees, in amounts as “may be determined by the Court.” R(1), Vol. 1, p. 435. Accordingly, if this Court determines that the District Court erred by concluding that Sky Canyon had waived its right to pre-appeal fees, then the matter should be remanded not only for a determination as to the “prevailing party,” but as to the “reasonableness” of Sky Canyon’s fee request.

In addition to the fees awarded Sky Canyon on its first appeal (\$31,615), Sky Canyon seeks an additional award of pre-appeal fees in the amount of \$40,546.50. This sum includes fees for unsuccessfully litigating the “Period of Declarant Control” issue. This sum also includes fees that exceed by \$13,181 the total fees incurred by the Golf Club in proceedings before the trial court. R(1), Vol. 3, pp. 787-91; R(1 - augmented), pp. 100-01.

In the event this Court determines that an award of Sky Canyon’s pre-appeal fees is appropriate, then based upon Section 24.8, the matter should be remanded to the District Court for a determination of the “reasonableness” of the fee request. For the reasons stated, any fees in excess of \$27,075 are unreasonable. There has been no showing that it was necessary or reasonable to

⁵In its Brief on appeal, Sky Canyon claims that the District Court “properly exercised its discretion to determine that Sky Canyon was the prevailing party for an award of attorney’s fees pursuant to Idaho Code §12-120(3).” See Appellant’s Brief at p. 6. The District Court made no such determination. The only post-appeal fee request made by Sky Canyon was predicated upon Section 24.8 of the Declaration. R(2), p. 61. As noted, the only authority cited by Sky Canyon in its complaint for an award of attorney fees was I.C. §12-121. The first time Sky Canyon asserted I.C. §12-120(3) as a basis for a fee award was in its Opening Brief filed with this Court on October 9, 2014. This Court will not typically consider an argument raised for the first time on appeal. See, e.g., KEB Enterprises, LP v. Smedley, 140 Idaho 746, 752, 101 P.3d 690 (2004).

engage three (3) separate attorneys, together with legal assistance, for purposes of briefing a routine case of contract interpretation that was decided on summary judgment.

V. CONCLUSION.

The District Court properly determined that Sky Canyon's claim for pre-appeal attorney fees had not been preserved and was specifically beyond the scope of the District Court's authority on remand following entry of this Court's decision in Sky Canyon Properties, LLC v. Golf Club at Black Rock, LLC, 155 Idaho 604, 315 P.3d 792 (2013). The District Court's decision is equally affirmable on the alternative basis urged by the Golf Club, to wit, that Sky Canyon's complaint failed to include any claim for attorney fees under Section 24.8 of the Declaration.

In the event this Court disagrees, and should it find that the District Court had authority to award Sky Canyon its pre-appeal attorney fees, then this Court should either determine that there was no prevailing party in proceedings before the District Court or, alternatively, it should remand the matter to the District Court for a determination as to whether or not there was an overall prevailing party for purposes of any award of pre-appeal attorney fees and costs.

Further, in the event this Court determines that the District Court erred, and that Sky Canyon properly preserved a claim to pre-appeal attorney fees, then the matter should be remanded for further proceedings to determine the reasonableness of the fees claimed by Sky Canyon in light of the fact that Sky Canyon prevailed on only one of its two claims for declaratory relief.

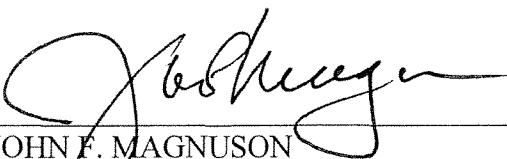
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The Golf Club requests an award of attorney fees and costs incurred in this appeal pursuant to Section 24.8 of the Declaration.

DATED this 18th day of December, 2014.



JOHN F. MAGNUSON
Attorney for Respondent

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